LIST OF CASES.

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Supreme Court of the United States,

OCTOBER TERM—1923.

QUEEN INSURANCE COMPANY OF AMERICA,
Petitioner,

—against—

GLOBE & RUTGERS FIRE INSURANCE COMPANY.

BRIEF FOR THE PETITIONER.

(On Certiorari.)

The steamship "Napoli" was sunk by the steamship "Lamington" in a collision between two convoys sailing without lights that met almost head on in the Mediterranean about midnight on July 4th, 1918. The "Napoli" carried a cargo, part of which consisted of munitions, raw materials for the manufacture of munitions, Red Cross surgical and medical supplies, and other articles consigned to various departments of the Italian Government at the Italian base, Genoa, for use in the War (Hann, pp. 177-180), and also some goods in which the British Government was interested, and some general merchandise for private consignees. A large part of the cargo, of course, was insured against both war and marine risks, in some cases both risks being placed with one company and in others the marine risk being placed with one company and the war risk being carried by another company, or with one of the Government War Risk Bureaus. Owing to the peculiar circumstances surrounding the loss, a question arose as to whether the loss should be regarded as a war

risk or a marine risk. Most of the marine and war risk underwriters each paid one-half the amount insured by them, and each set of underwriters took assignments of the assureds' rights against the other set. In the present case the petitioner insured a shipment of asbestos fiber, shipped from New York consigned to the British Consul at Genoa, against marine risks (Ex. A, at p. 6) and the appellee insured the same shipment against the usual war risks (Ex. A, at p. 6). Each company has paid one-half of the amount insured by it, without prejudice, and taken an assignment of the beneficial interest of the assured against the other underwriter (pp. 7-8). The present suit is brought by the company insuring the marine risk to recover the unpaid balance of the war risk policy.

Situation at the Time of the Collision.

At the time the collision occurred, July 4th, 1918, the war was at an acute stage. The last great German attack on the Western Front was about to begin and the Allied counter-stroke followed soon after. Germany had staked her chances on submarine warfare, and her submarines in the Mediterranean, as well as elsewhere in the so-called war zone, were sinking merchantmen without regard to their flag and with the ruthless disregard for the lives of civilians that characterized the German submarine warfare at its worst. A few of the fast liners like the "Leviathan" and the "Aquitania" were still crossing the seas without convoy (except when leaving or nearing port), and trusting to their speed and the guns they carried for protection. But for the slower merchantmen (such as the "Napoli" and the "Lamington" and the other vessels making up the two convoys) the only practicable method of navigation in the war

zone was in convoy. As Judge Hough, before whom the case was tried, found (p. 183):

> "It is an inference easily made from what is proven, that she (the 'Napoli') would have run far greater danger by avoiding convoy than by joining one; she sought the protection of a convoy, and so did all other well advised vessels of no greater speed than 'Napoli' possessed (twelve knots)."

In the statement of facts in the Circuit Court of Appeals it is stated (p. 199) that:

> "There appears to be no national or international authority which required the vessels to sail in convoy, but this custom at the time was universally followed."

Judge Mayer, in his concurring opinion, phrased the same thought as follows (p. 205):

> "It is true that so far as disclosed by the evidence there is 'nothing to show that "Napoli" or any other merchantman was compelled to go in convoy.'
>
> Yet this, I think, refers more to form than to substance. If a merchantman had set out without convoy for a voyage through a known submarine-operated area, her owner or master would have been subjected to grave condemnation for the risk to life, as well as property, thus recklessly incurred.
>
> There was a moral compulsion to seek convoy aid, equivalent, in war, to a compulsion in law."

General Plan of the Convoys.

The Mediterranean convoys were made up at Gibraltar and Genoa respectively, Genoa being the principal army base for the Italian army and Gibraltar being one

of the principal naval bases for the British Mediterranean fleet. The convoys were made up under the direction of the naval authorities at Gibraltar and Genoa respectively. Each convoy consisted of a varying number of merchantmen of about the same speed and a naval escort assigned to convoy them. Each convoy had a naval officer as Commodore of Convoy, who sailed on one of the merchant ships. The senior Commander of the convoying warships commanded such warships. The entire convoy was in command of the Senior Naval Officer, who might be either the Commodore of Convoy or the Senior Commanding Officer of the escorting vessels, whichever happened to be senior (pp. 144, 154, 155). Each convoy was given certain secret sailing instructions upon leaving the naval base. These instructions emanated from the naval authorities in command at Genoa or Gibraltar (pp. 138-9). The Senior Naval Officer had discretionary authority to vary the sailing orders as circumstances might require, and the detailed navigation was prescribed from time to time by the naval officers in the convoy.

No freedom of navigation whatever was permitted the merchantmen in the convoy. Their navigation was prescribed in three ways:

(1) By the sailing orders issued at the base from which they started (pp. 138-9, 171, Exhibits 1, p. 13, and 5, p. 66);

(2) By the Commodore of Convoy and the Senior Naval Officer (pp. 144, 146, 154), and

(3) By certain general British convoy regulations as to lights, etc. (pp. 140, 142).

In one or another of these ways, the naval authorities prescribed:

(1) The course of each convoy (pp. 139, 140, 145, 153, 154, 155, 14, 68).

(2) The speed of the convoys (pp. 155, 146, 147, 68).

(3) The arrangement of the vessels in tiers and columns (pp. 142, 145, 67).

(4) Their distance apart (pp. 160, 68).

(5) When to zigzag and the exact zigzag to be followed (pp. 145-6).

(6) That no lights must be shown except in great emergency (pp. 108, 128, Q. 145-7, p. 141).

(7) As Captain Asserson said, the Senior Naval Officer was in "command of the entire convoy, merchant as well as naval vessels" (p. 144) and even matters of immediate navigation such as porting and starboarding were prescribed by the Commodore of Convoy (p. 145). As Captain Burns phrases it, the Senior Naval Officer was responsible "for the manoeuvers, laying off courses and general conduct" of the whole convoy (p. 161).

These regulations had the legal status of law and the sanction of force behind them. The convoys were proceeding under the British regulations, and all vessels in convoy were subject to the British Naval Discipline Act of 1886. This is well pointed out by Lord Shaw in the case of *The Matiana* (1921), 1 A. C., at pp. 123-4, where he says of the British Naval Discipline Act:

> "Sect. 31 of that Act provides: 'Every Master or other Officer in command of any Merchant or other Vessel under the Convoy of any Ship of Her

Majesty shall obey the Commanding Officer thereof in all Matters relating to the Navigation or Security of the Convoy, and shall take such Precautions for avoiding the Enemy as may be directed by such Commanding Officer; and if he shall fail to obey such Directions, such Commanding Officer may compel Obedience by Force of Arms, without being liable for any Loss of Life or of Property that may result from his using such Force.' It is difficult to figure language which more emphatically puts the naval commander of the convoy in control of the movements of the merchant vessel. To all intents and purposes it is the same as if he had placed on the convoyed ship a naval officer in command as subordinate to himself. In short, so far as the direction of the course of the vessel was concerned, the merchant captain and officers were no longer in control. The naval officers were. Not only so, but the orders of the commander of the convoy were clothed with the instant sanction of force. An order disobeyed might be followed by the guns of the convoy being levelled or fired against the offending vessel, and the officer is secured by statute against liability for any consequent loss of life or property."

The fact that even the minutest details of navigation of the merchant ships in the convoy, as well as their general course, were prescribed by the naval authorities is recognized in the statement of facts in the Circuit Court of Appeals (pp. 198-199) and also by Judge Mayer (p. 205) as well as Judge Hough (p. 183).

The Eastbound Convoy.

The steamship "Napoli" was one of the merchant ships in a convoy bound from Gibraltar for Genoa. The convoy consisted of twenty ships (of which two or

three left the convoy before the collision and proceeded to Marseilles) (Asserson, p. 130). The escorting warships were as follows: The British Warship H. M. S. "Jeannette II," commanded by Captain Ryan, who was the senior naval officer of the convoy, the British Trawler "Algol," the Italian Auxiliary "Tocra," and the U. S. S. "Castine," commanded by Captain Asserson, U. S. N. The convoy left Gibraltar on June 30th, 1918 (Asserson, p. 138). The Commodore of Convoy was Commander Ignasio of the Italian Navy on board the S. S. "Napoli" (p. 138).

Sailing Instructions of the Eastbound Convoy.

The convoy received through Admiral Niblack, commanding the United States Patrol Forces at Gibraltar, from the Chief of Staff to Admiral Grant, Royal Navy, who was the senior officer ot Gibraltar, written sailing instructions (pp. 138-9), the material portion of which was as follows ("Castine" Sailing Orders, p. 14):

"2. The route to Genoa is as follows:

After leaving Europa Point steer to pass through the following positions:

	(1)	Lat. 35..30 N.	Long.	04..00 W.	
	(2)	" 36..00 N.	"	00..40 W.	
	(3)	" 36..20 N.	"	00..00 W.	
	(4)	" 37..10 N.	"	03..05 E.	
	(5)	" 37..10 N.	"	05..08 E.	
	(6)	" 41..20 N.	"	07..40 E.	
	(7)	" 41..47 N.	"	07..43 E.	Toulon Rendezvous
XH	(8)	" 42..58 N.	"	07..50 E.	Genoa Rendezvous

Thence according to instructions from Genoa.

* * *

"6. The convoy is timed to arrive at Toulon R. V. (41..47 N.—7..43 E. at 0900) (9 A. M.)

on the 5th July, steering for a position on (42..58 N.—7..50 E. The Genoa R. V. The Commodore is to report through the senior officer of the escort by W/T to Viadux, Marseilles, how many hours ahead or behind the scheduled time of arrival the convoy is expected to be at the Toulon R. V.

* * *

"8. The convoy is timed to arrive at the Genoa R. V. (42..35 N.—7..50 E?) at 1900 (7 P. M.) on 5th July. The Commodore is to report through the Senior Officer of the Escort by W/T to Madelena or Cape Sperone for Viadux Genoa, 24 hours before arriving the number of hours he is ahead or behind the scheduled time of arriving in accordance with instructions issued with the Secret Positions which are to be obtained from Operations before sailing.

"9. The convoy is timed to arrive off Genoa at 0900 (9 A. M.) on the 6th July, which time is to be kept."

Course of the Eastbound Convoy.

The convoy followed the prescribed route (p. 139), but slightly East of the exact position laid down in the sailing orders. This convoy had gotten twenty-four hours ahead of scheduled time when the collision occurred, on orders from the Senior Naval Officer (p. 147). At the time of the collision, the convoy had passed the Genoa Rendezvous and, as no instructions had been received from Genoa (so far as the record shows) was proceeding on a course prescribed by the Senior Naval Officer (p. 183):

"Q. What were your general instructions as to the following of the sailing instructions as to routes in the convoys? A. The route was ordinarily to be followed closely; the senior officer

present could, of course, change these for any sufficient reason, such as a submarine being reported in the vicinity" (Asserson, p. 140).

On the voyage the convoy received a number of reports of submarines in the general vicinity (Asserson, pp. 140-1). On July 4th at 6:59 P. M. the convoy received a message from the Italian Auxiliary "Citta di Bengazi," reporting a submarine 43..25 N.—8..27 E. This was the report of the encounter with a submarine of the convoy in which the "Lamington" was traveling (p. 141) which is described hereafter.

The courses of the two convoys were plotted on a chart by the commanders of two of the convoying warships (pp. 141, 154). This chart was marked Libellant's Exhibit 1, and is referred to on page 100, but not printed.

It is quite true, as Judge Hough says in his opinion (pp. 183, 184), that the sailing courses laid down in the instructions issued at Genoa and Gibraltar did not necessarily result in the collision. It is, however, indisputable that the courses laid down in the sailing instructions, *plus the detailed orders of navigation given during the voyage by the Senior Naval Officer and Commodore of Convoy,* did necessarily bring the two convoys into collision.

The Commodore of the eastbound convoy, who was on board the "Napoli," signalled in the afternoon of July 4th to all vessels of the convoy and the escort that an additional escort of Italian destroyers would probably be met with about midnight (Asserson, p. 143). The collision occurred at about 11:38 P. M. (Greenwich Mean Time) (Asserson, p. 142). (Note that the "Castine's" log gives the hour as 12:38, but the War Diary is correct and the log is probably just an accidental use of Genoa Daylight Saving Time.)

Sailing Instructions of the Westbound Convoy.

This convoy consisted of sixteen merchantmen, convoyed by the U. S. S. "Yankton" commanded by Captain Burns, U. S. N., who was the senior naval officer of the convoy, the Italian Naval Auxiliary "Citti di Bengazi," the Italian Destroyer "Granatierre," and the British Trawler "Achenar." The Commodore of the Convoy was on the "Ansaldo III". The sailing instructions were as follows (p. 68):

> "Convoy will form outside the port according to diagram attached. (The diagram was not obtainable, but the detailed course is given by Captain Burns' testimony, and by the Italian Court Inquiry.)
>
> Column will be 800 yards zigzag.
> 600 yards no zigzag.
>
> Ships in column 400 yards.
>
> Ships to take station as soon as possible. When formed, speed will be ordered by signal. The maximum speed of the convoy will be 7½ knots. Zigzag No. 2 will be used if signal is made to zigzag.
>
> ROUTES. After leaving red buoy. South true and then courses in according to the signal of Commodore."

The convoy formed outside of Genoa at 10:30 A. M. July 4th, and consisted of eighteen merchant ships—a front line of eight ships, a second line of seven ships, and a third line of three ships (p. 70). The convoy's speed was 7½ knots, and the "Yankton" was on the starboard flank, one point forward of the beam of the first line of ships ("Yankton" War Diary, p. 70).

About 7 P. M. on the 4th the convoy was proceeding on a course 214 Deg. true, when the steamer "Merida" was torpedoed. The "Yankton" stood to the rear and the other escorting vessels dropped depth bombs, etc.

Between four and five in the afternoon before the submarine attack, the Convoy Commodore had directed the following changes of course which should be made during the night: (This was the customary method of arranging during the day time by flag signals for the changes of course which were to occur during the night.) The orders were at 8:30 P. M. to change course to 247 Deg. true and at 10:30 P. M. to change it to 261 Deg. true (Burns, p. 154; "Yankton" War Diary, p. 70). These instructions were obeyed (Burns, p. 154).

Plotting the course of the "Yankton" shows that between 7 P. M., when the attack occurred, and 8:30 P. M., when the change of course occurred, the westbound convoy departed materially from her course. Just exactly what these changes of course were, we have not been able to ascertain because the "Yankton" was off her station and did not get all the messages (Burns, p. 154), and the communication log of the "Yankton" shows some signals which we have been unable to translate, as they are stated by Captain Burns (not in the record) to have been given in a typewritten code supplied specially for this voyage and not now available. It appears, however, that *during and as a result of the submarine attack, the course had been changed at least twice by signal from the Commodore—once to the right and once to the left* ("Yankton" War Diary, p. 70; Burns, p. 154). The distances or times not being known, it is uncertain whether these changes neutralized each other or not, but it is stated in a letter from the Admiralty of September 10th, 1920, that:

> "5. As one of the convoys had been forced away from its route, owing to the presence of submarine, the routes followed by the convoys cannot be of any material assistance" (p. 120).

Conditions of the Convoys Immediately Before the Collision.

The eastbound convoy was proceeding on a course 45 Deg. true. The "Napoli" was in the front line—the third ship from the left (Commission of Inquiry, p. 114) or the fourth ship from the left (Bologna, p. 123, Q. 22). The convoy was proceeding at 7½ knots (Bologna, p. 123, Q. 26). The vessels were about 400 yards apart from beam to beam (pp. 144, 160). Between each tier that is, from the stern of the front ship to the bow of the ship behind it in the next tier, was about 600 yards (pp. 145, 160). All the vessels were operating without lights in accordance with instructions from the British Authorities (Asserson, p. 140; Goodrich, p. 171; Bologna, p. 130, Q. 145).

The westbound convoy was proceeding on a course 260 Deg. true. The vessels were about 500 yards apart from side to side and about 400 yards apart between tiers (Burns, p. 160; Opinion, p. 185). This would give a frontage of a little less than two miles for the Eastbound convoy and a little more than two miles for the Westbound convoy, and Judge Hough so found (p. 185).

The speed of the Westbound convoy was approximately 7 3/10th knots, as is stated in Judge Hough's opinion (p. 186). The Eastbound convoy was proceeding at a slightly greater speed, 7½ knots (p. 123; Q. 26).

The Collision.

The collision occurred at about 11:38 P. M. There is a sketch showing approximately the way it occurred, which was based on the findings of the Italian Commission (Exhibit 10, p. 101). Some of the evidence ob-

tained later contradicts it in some details, none of which are believed to be material to the case. (See Judge Hough's Opinion, p. 185).

The situation was briefly this: Two tiers of ships, each about two miles across, became aware of each other at a distance of approximately one-half mile. They were approaching each other at a combined speed of about fifteen knots, so that from the time they became aware of each other until they would have collided, there was only from two to three minutes of time for manouevring. Behind each tier of ships were two following tiers, which obviously could not appreciate what was going on in front of the front tier, but which could be expected to do, what they, in fact, did do, namely, continue on their course and thus run on to the front tier if the front tier stopped or slowed. There is nothing to indicate that when the vessels of the front tier perceived each other any of them appreciated that they were encountering a large convoy. It is to be remembered that the Eastbound convoy, at least, was anticipating meeting further Italian destroyers to act as escort, and some or all of the vessels may well have mistaken the Westbound convoy for such destroyers. Capt. Burns, for example, thought there was a submarine attack (p. 164). Neither convoy had any advice that they might expect to meet or pass near any other convoy. As Judge Hough points out, the Naval Authorities had taken no steps to inform either convoy of the location of the other.

On this subject, Judge Hough said (p. 189):

> "It follows that, in my opinion, a certain and important navigator's fault lay with the Senior Naval Officers of both convoys in failing to take any steps to prevent just such a meeting as did occur."

Again Judge Hough said (p. 194):

> "Here, in my judgment, there was a singular and inexcusable lack of care in indicating any lanes of traffic to the opposing streams of convoy travel between Genoa and Gibraltar; and these convoys were moving almost like ferries."

* * *

The Question of Negligent Navigation.

All the facts stated up to this point are clearly established, without substantial conflict. But when the leading ships of the two convoys perceived ships approaching, great confusion naturally arose, and the accounts of the manoeuvres of the various ships are fragmentary, and frequently contradictory. Perhaps the best summary of the conflicting accounts is given in the opinion rendered by Mr. Justice Hill in the suit brought in England by the owners of cargo on the "Napoli" against the owners of the "Lamington." He said (p. 175):

> "The convoys sighted one another at a short distance. I accept the evidence for the defendants that it was something like 350 yards. The lights were switched on. Each of these ships and the other ships made a number of manoeuvres, ported and starboarded, to avoid other ships, and finally these two collided. When I say 'finally,' I have taken almost more time to describe what was taking place than was probably occupied between the time of sighting and the collision. The speed of the 'Lamington' was six to seven knots, and the speed of the 'Napoli' was, in convoy, seven and a half knots. The 'Napoli' says that she slowed and stopped, but, even assuming that to be the case, the joint speeds must have been still 10 to 12 knots, at least until a very short time before the collision, and, therefore, the

whole thing must have happened in a very short time, probably a minute. There was undoubtedly great confusion, and, according to the Master of the 'Napoli,' all sorts of whistle signals were being sounded by many ships.

"The 'Napoli's' account, I gather, of what happened is that, having slowed and then stopped, the green light of the 'Lamington' was seen 150 metres away, as pleaded, on the port beam, and the 'Napoli' hard-a-ported and went full speed astern. That port beam is altered in evidence to three points on the port bow. The 'Lamington' says that what happened was, that she saw the green light of the 'Napoli' about three lengths away—or, as pleaded, I think it is rather further, two cables—fine on the starboard bow. The 'Lamington' starboarded.

"The green light broadened, and then the red opened, and the 'Lamington' went full speed astern, and the collision followed. The pleaded case of the 'Napoli' on the causes obviously will not bring about a collision at an angle of seven points heading aft on the 'Napoli,' which is the agreed angle; and, when I find so great a difference between the evidence case of the 'Napoli' and her preliminary act case, in so important a particular, I am quite incredulous as to the 'Napoli's' evidence, and I am quite unable to act upon it.

"On the other hand, the 'Lamington's' Master has given his evidence this morning, and given it very well, and I accept it. The difficulty in accepting it is to reconcile the angle with the starboarding and hardastarboarding of the 'Lamington' and the hardaporting of 'Napoli,' if the 'Napoli' had first gone slow and then stopped and had her engines stopped and very little way at the time she saw the 'Lamington.' I am incredulous about this evidence of the 'Napoli,' and I do not know that her engines were stopped. I am really not at all sure that the lights which each says they saw on the other ship were the lights of the other ship, or were not the lights of other vessels in the convoy * * *."

Judge Hough reached the conclusion that both the "Napoli" and the "Lamington" were at fault in their navigation (p. 187). Judge Manton in the Circuit Court of Appeals seemed to agree (p. 204).

But, even if this be so, such faults in navigation were clearly *error in extremis*.

Judge Mayer in his concurring opinion said (p. 205):

> "The District Court was of opinion that the collision resulted proximately 'from poor navigation on the part of both vessels.' It seems to me that neither vessel was legally at fault. If we assume that the District Court was right in ascribing fault to each vessel, yet such fault must be regarded as having been committed *in extremis* in a situation so unexpected, confusing and exciting as to invite for its description the pen of a Conrad."

In the British case, Mr. Justice Hill decided (p. 176):

> "* * * it seems to me to be quite clear that this is one of those cases in which two convoys, unlighted, suddenly became aware of one another's presence at a very close distance, became greatly confused in their formation, and in their efforts they made to avoid one another, without any fault on the part of anybody, the collision took place."

The Italian Court of Inquiry said:

> "Owing to the short distance between the two convoys, the courses whereof were bringing them to meet * * * it was not possible for the two convoys to manoeuvre and bear at the same time to the convenient side in order to avoid a collision. Nor was it possible to stop the two convoys, because in the instructions given no provision was made for a luminous emergency signal to order such a maneouvre.

"No general manoeuvre, on the other hand, being possible, each Commander manoeuvred separately endeavoring to avoid a collision (p. 115).

"The Commission, however, feel it their duty to point out the circumstances under which the manoeuvres in question had to be executed and are of opinion that the anxiety of the Commanders must have been very great because, besides having to avoid the steamers ahead, they had also to see to avoid being struck by those astern. Moreover, the sudden appearing of so many lights, the noise of so many sound signals directing the manouvres must necessarily have generated a confusion which was entirely to the disadvantage of the necessary calm which every Commander had to preserve in order to avoid collisions which appeared impending from all sides" (p. 117).

Captain Asserson's account of the collision, in answer to Mr. Burlingham's *cross examination* was as follows:

"Q. It was each ship to do the thing that was at hand? A. Each ship for herself to do the best she can.

"Q. And, of course, you not having seen the thing, whether the 'Napoli' or 'Lamington' or the 'Sverdrup' did the right thing or not in the circumstances—it was a case for quick and prompt and independent navigation—and no man who didn't see it could judge whether they did the right thing or the wrong thing? A. That is exactly right.

"Q. And nobody could say whether it could have been avoided or could not have been avoided by prompt action on the part of the navigating officer of either of the colliding boats, is that it? A. That is exactly it" (pp. 152-3).

Captain Burns' account was as follows (p. 166):

"At about 11:40 a white light was observed which was thought to be on the Commodore's ship, remaining on about 10 seconds. Blasts of

whistles followed, whereupon a number of ships turned on navigational lights, a great confusion of whistles, some one blast, others two blasts, others three blasts. Ships in the center and left in great confusion. At 11:50 green and red lights were observed steering in various directions. One ship observed steering in opposition direction to course of convoy and stood through the formation. Ships on our flank turned on lights, steered to right, then to left. I was unable to determine what had taken place. My first impression was that a submarine attack had taken place, but no warnings to this effect were given. The confusion of whistles and lights moving in many directions continued until about 12:15. Manoeuvred at full speed so as to keep in touch with as many ships as possible and finally steered on course 261 deg. true, having five ships together. A few other ships were observed in the darkness well off on port hand."

POINT I.

The loss was a proximate result of "acts of Kings in prosecution of hostilities."

The respondent's policy of war risk insurance provided that

> "This insurance covers * * * destruction, or damage, by * * * acts of kings, princes and people authorized by and in prosecution of hostilities between belligerent nations" (Exhibit B, Record, at p. 6, quoted on p. 2).

It is submitted that the loss of the cargo of the "Napoli" is recoverable under this policy.

If the "Napoli" and the "Lamington" had been approaching each other at the time and on the courses

on which they were proceeding at the time of the present collision, and each had been navigating alone under peace time conditions, and they had become aware of each other at a distance of even 350 yards, it would have been perfectly simple for them to have avoided the collision, and it can hardly be doubted that no collision would have occurred. The reason that they collided was that the conditions under which they were operating, upon orders from the naval authorities, rendered it practically impossible for them to avoid each other without colliding with other ships. The efficient cause of the collision, it is submitted, was the combined effect of navigating as units two great fleets of vessels, traveling in comparatively close formation, without lights, upon courses which met and without any system by which either convoy was advised of the approach of the other. All these proceedings were directly prescribed by the naval authorities as has been pointed out in the statement of facts.

The methods of navigation of the convoys were unquestionably adopted as an essential part of the conduct of the war. The war was not won alone upon the battlefields of France; it was won as much, perhaps, by the methods adopted by the Allies, on the one hand to keep food supplies and munitions out of Germany, and, on the other hand to keep streams of such commodities flowing from the producing sections of the earth to the ports and naval bases of the European Allies. The war was a war between nations, and it was won by the Allies in large part because they were able to draw continuous supplies, both for the army and navy and for the civilian populations, from the lands across the seas not directly desolated by the war. If merchant ships had continued to navigate in the war zone in the same way that they sailed in times of peace, the experiences of the earlier years of the war, particularly in the Spring of 1917,

when the intensified submarine campaign was launched by Germany, clearly demonstrated that the German submarines would, in a comparatively short time, sink so large a portion of the total tonnage of the world as to cut off from the European Allies munitions and supplies which were essential to their successful conduct of the war. It was to meet this condition that the convoy system was adopted. The convoy system, it is submitted, was, therefore, directly a war measure. It afforded ships increased protection against submarines, but, on the other hand, it created new dangers, including the risk of such disasters as the one here involved. As war risk underwriters thus benefited from the convoy system, it is submitted that they should also bear the burdens which this system created. This is essentially equitable, for, while marine risk underwriters received substantially the same premium during the war as before the war, war risk underwriters received from five to ten and even as high as forty per cent. premiums. As they were paid for assuming the extra risks of war, it is essentially unfair that disasters like the present should be imposed upon the marine underwriters.

This view was very clearly expressed by Judge Mayer, who said (p. 205):

> "If the case were unembarrassed by authority, I should say that the method of navigation prescribed by the naval authorities was the proximate cause of collision.
>
> * * * * * *
>
> "When, therefore, these vessels began their voyages in opposite directions, the flotilla in which each was grouped was under command of navigators from the top down, who knew nothing whatever of the existence or movement of the other flotilla. Why was this? Obviously, because of war necessity. In effect, the navigators were not free agents, so far as concerned their ability

to anticipate, by the ordinary usages and precautions of navigation, the presence of the other convoyed vessels; and, this going to sea, almost with closed eyes, was imperative for the delivery of cargoes vital to sustain the physical and economic life of allies and associates cooperating to defeat a common enemy. This war, perhaps more than any other, has emphatically demonstrated that the furnishing of munitions and supplies is as indispensable an operation of war as the movement of armies and navies. The point of the *Ionides* case is found in the opinion of Byles, J., when he said: 'First the original meritorious cause (and in popular language the cause of the loss) was the captain's being out of reckoning. * * * The absence of the light was * * * merely the absence of an extrinsic saving power.' Thus, impulse was given to the 'aggravated marine peril' theory. But, I think it is going far to extend that theory to the case at bar.

"The theory of this case should be that 'a warlike operation' is not confined to actual offense, attack or armed engagement but, may, in any event, comprehend a movement of vessels initiated in accordance with sovereign compulsion for the purpose of delivering munitions and supplies either to one's own country or to allies or associates."

Judge Hough quite clearly expressed himself as in accord on principle with this view, saying (p. 192 *et seq.*):

"My own view on this matter is that of Bailhache, J., expressed in *The Petersham* (*Britain, etc. Co.* v. *The King* [1919], 1 K. B., 575, 580), and *The Matiana* (*British, etc. Co.* v. *Green* [1919], 1 K. B., 632, 636), viz.:

" 'However peaceful the immediate business upon which a ship is engaged—if she is sailing as one of a convoy she is engaged, in my opinion, in a warlike operation. The assembling, presence, protection and movements of the King's ships pro-

tecting the convoy are a warlike operation, and both convoyed and convoying ships are taking part in it, and that character attaches to the whole flotilla and covers the whole operation.'

"And the learned Judge continues:

"'Suppose a dangerous route from which lights had been removed was prescribed (by the authorities) to deceive the enemy; and a ship taking such a route, without negligence runs ashore and is lost as the direct result of the removal of the lights;—would such a loss be covered by the words "warlike operations"? I think it would, but not because the ship was carrying out a warlike operation. The warlike operation would be the removal of the lights.'"

Judge Hough further said:

"This I think to be the large and common-sense view of the situation. Quite possibly there was a time when war was no more than the *ultima ratio regum;* and while Kings wrangled traffic might continue subject to the right of search and most oppressive Stowell-made rules as to contraband; but still it was essentially peace-time traffic, peacefully conducted in the main.

"But when war became what it was between 1914-1918, it is now history that commerce existed only as an adjunct to war and for the purpose of creating and maintaining armed forces to insure the economic defeat of the enemy.

"The 'Napoli' was taking a cargo from America to Italy, and even Courts may take cognizance of the fact that in June, 1918, no such cargo was a possibility that did not in the opinion of governmental representatives from at least three Governments (British, Italian and American) directly assist in the task of defeating Germany. In a large sense the very act of sailing was a consequence of hostilities. In short, almost every act of the warring countries after the home-staying population was fed, clothed and sheltered, was but a manifestation of war. For these reasons I

agree in principle with Bailhache, J., and particularly sympathize with the defiance flung by him at the reasoning of the *The Ionides* case, *supra*, indicated in the last of the above quotations."

The lower Courts reached their conclusions, not on principle, but out of deference to the decision of the House of Lords in the cases of the *Matiana* and *Petersham*.

Judge Mayer phrased this very clearly, saying (p. 206):

> "Yet, whatever our own views may be, I think the District Court, per Hough, J., was right in recognizing the commercial necessity of following the *Petersham* and *Matiana* cases, decided by the House of Lords by the narrow margin of three to two.
>
> "The questions in the case at bar are not local but affect an important class of world wide business in which the relations are so interwoven and connected that it would be unfortunate and confusing if a court of less authority than the Supreme Court of the United States were to arrive at a result different from that reached by the House of Lords."

Judge Manton rested his opinion on the ground that the collision was due to negligence (p. 291). Judge Rogers concurred in affirmance without stating his reasons (fol. 290).

Judge Hough, sitting in the District Court, said (p. 194):

> "* * * it must be held under authority, to which for business purposes the Courts of the United States should conform, that the collision in question was not proximately caused by any act of hostility or by the consequences thereof * * *."

The English Cases.

The course of the English opinions may be outlined as follows: The first case of moment is *The St. Oswald, British & Foreign Steamship Co.* v. *Rex* (1918), 2 K. B., 879; 34 T. L. R., 546 (Court of Appeal). *The St. Oswald* was requisitioned by the British Admiralty under the terms of a charter by which the Government assumed the risk of "all consequences of hostilities or warlike operations." The ship was employed in December, 1915, in assisting in the evacuation of the British troops from Gallipoli and bringing them back to the base at Indros. Under Admiralty instructions she was proceeding at night at full speed without lights towards Gallipoli. The French warship "Suffren" was proceeding similarly at full speed and without lights, and the two ships became aware of each other at a distance of about a quarter of a mile. Their navigating officers, in the extremity in which they found themselves, both turned in the same direction and came into collision, as the result of which *The St. Oswald* was lost. The Courts found that the collision was occasioned solely by the absence of lights and the speed at which the vessels were proceeding. The Judges of the Court of Appeal then said that as the Attorney General had admitted that sailing at full speed without lights was a military operation, the loss was the result of a warlike operation and fell upon the Admiralty, and a reading of the three opinions in the Court of Appeal fairly indicates that the decision was reached on the theory that sailing at night at full speed and without lights under Admiralty orders is a warlike operation; that if, as a result of this dangerous form of navigation, two ships do not see each other in time to avert a collision, and if there is no intervening fault on the part of either ship (*error*

in extremis not being considered such a fault), the loss will be held to be a war risk. This was the interpretation put upon the case by Mr. Justice Bailhache in the case of *The Larrinaga* (1920), 1 K. B., at page 705, and by Viscount Cave in *The Petersham* (1921), 1 A. C., at page 108.

This is at least an intelligible rule which would be workable in all cases. The rule has, however, not been followed in the later British cases, as appears hereafter.

The Petersham (1921), 1 A. C., 99;
The Matiana (1921), 1 A. C., 99.

These two cases were decided together in the House of Lords. *The Petersham* was carrying a cargo from Bilbao to Glasgow for private interests and came into collision off the Cornish coast with the Spanish merchant ship *Serra,* which was on a voyage from Swansea to Bilbao with a cargo of fuel, also for private owners. Both vessels were proceeding at night, without lights, pursuant to Admiralty orders, and, as a result, did not see each other in time to avoid collision, although neither ship was negligent. The House of Lords decided that the loss was an ordinary marine risk, on the ground that the carrying of ordinary merchant cargo was not a warlike operation and was not made such by the fact that it was carried on by the ships sailing without lights under Admiralty instructions. The opinions of the various Lords distinguish *The St. Oswald* on the ground that the evacuation of troops from Gallipoli was a warlike operation and that, therefore, her loss was attributable to a warlike operation.

The Matiana was a case involving a vessel in convoy. *The Matiana* was carrying a cargo of cotton for private owners from Alexandria to a British port and with three

other merchant ships was under convoy with an escort of four British warships. The Senior Naval Officer of the convoy directed the convoy to take a course which was quite unusual and which brought the convoy close to the Keith Rocks, a dangerous reef in the Mediterranean. Under similar orders of the Senior Naval Officer the convoy zigzagged on its course. During a still night, when there was no surf to disclose the presence of part of the reef which lay just below the surface of the Mediterranean, *The Matiana* stranded on one of the outlying rocks and became a total loss. Judge Bailhache, who tried the case in the court of first instance, held that it was a war loss, saying (1919) 1 K. B., 632, at page 636:

> "To sail with convoy is, in my opinion, a warlike operation. The assembling of the ships to be convoyed, and of the men-of-war to convoy them, the voyage of the whole flotilla, the route chosen and the precautionary measures taken on the voyage must be taken together as all part of a warlike operation. In this case the vessels pursued a zigzag course, and were sailing at the time of the stranding through a submarine-infested area, and some 30 miles to the northward of the ordinary peace time course. The stranding happened in the course of this warlike operation, and, subject to another point made by the war risk underwriters, was directly due to it."

The Court of Appeal reversed Judge Bailhache, and the House of Lords, by a vote of three to two, affirmed the decision of the Court of Appeal, holding that the loss of "The Matiana" was a marine loss. The ground upon which the Court of Appeal proceeded is expressed as follows by Lord Justice Atkin (1919) 2 K. B. 670, at page 698:

> "It appears to me fallacious to identify the merchant vessels sailing with convoy with the

> warships which escort them. The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peace-like operation of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding."

This passage was quoted with approval by the majority of the House of Lords. Their theory was that as the merchant vessels were engaged in a peace-like operation at the time of the stranding, there was no war-like operation to which the loss could be attributed, and, therefore, the stranding must have been due to an ordinary marine peril. Lord Shaw and Viscount Cave dissented. Lord Shaw put his dissent upon the following ground:

> "I do not doubt that so far as the ships acting as convoy were concerned they were thus conducting a warlike operation. I think the decision in the case of *Ard Coasters Ld.* v. *The King,* to the effect that a warship patrolling in the course of her duty and thereby causing a collision with a merchant vessel, was a right decision. * * * Suppose, in the present case one of the ships acting as convoy had run down one of the ships convoyed, I can hardly doubt that that event would have been similarly found. The case accordingly is narrowed to the distinction between ships which are acting as convoy and ships which are themselves under convoy. I myself see great force in the view which Bailhache, J., so clearly expresses to the effect that all the vessels—those acting as convoy and those under convoy—must be treated as a unity. He concludes accordingly that they were all engaged in warlike operations. I respectfully agree with that learned judge. * * *
>
> "I am humbly of opinion that, so far as ships under convoy are concerned, all these ships are,

along with the ships acting as convoy, under a unified command, and that command issuing from the commander of the convoy is, as part of the direction of the convoy, a military operation. The consequence of it upon those merchant vessels to whom the command was issued was to place them compulsorily in a situation of peril in which unquestionably they would not have been placed but for the course thus forced upon them."

Viscount Cave expressed his dissenting view as follows (1921), 1 A. C., 107, at pages 110, 111:

"No doubt the existence of the reef and its surrounding currents was a condition without which the vessel would not have stranded; but the true cause of the stranding was the act or event which brought the vessel within their dangerous influence. If she had been driven upon them by a storm or by hostile pursuit, or had been brought there by the negligence of those on board, the loss would have been properly described as caused, not by the reef or its currents, but by the storm or by the enemy or by bad seamanship, as the case might be. In fact she was compelled to enter the area of danger by the orders of the officer commanding the escort, which she had neither the right nor the power to disobey; and I think the true conclusion is that those orders were the direct and determining cause of her loss. It is contended that, even if this be so, it does not follow that the loss was a consequence of warlike operations, as the giving of an order cannot in itself be an operation. Perhaps it cannot, if the order stands alone. But in the present case the orders were a part of the convoying operation which included the choice of the route, the setting of the course, and the precautions taken on the voyage; and I do not think that the transaction can be split up and treated as in part an operation and in part something other than an operation. It was the duty of the commanding officer, for the protection both of the

warships under his command and of the merchant vesesls under his care, to direct the course of the convoy as he thought best; and in doing so he was but carrying out the operation with which he was charged. In my opinion, therefore, the loss was a consequence of warlike operations within the meaning of the war risk policy."

The Ardgantock, Attorney General v. *Ard Coasters* (1921), 2 A. C., 141.
The Richard de Larrinaga, Liverpool v. *Marine Underwriters* (1921), 2 A. C., 141.

These two cases were likewise decided together in the House of Lords. *The Ardgantock,* with an ordinary merchant cargo, was proceeding northerly at night in the North Sea without lights, under Admiralty instructions. His Majesty's warship "Tartar" was patrolling in the same waters and proceeding on an opposite and parallel course to *The Ardgantock.* No collision would have occurred except for the fact that the "Tartar" reached the end of her particular patrol and turned, quite by accident, at the moment she was passing *The Ardgantock,* and as neither ship saw the other in time to avoid collision, the "Tartar" struck *The Ardgantock* amidships and sank her. The House of Lords held that this was a war loss on the ground that the "Tartar" was engaged in a warlike operation which was the proximate cause of the disaster.

The Richard de Larrinaga was sailing in convoy with an ordinary merchant cargo. His Majesty's warship "Devonshire" was proceeding on a voyage to pick up a convoy of merchant vessels at a rendezvous from which she was to act as part of the escort. Owing to the absence of lights, the two ships did not see each other, and came into collision. At the time, the "Devonshire" was not patrolling or performing any warlike function

except that she was on her way to join the convoy as stated. The House of Lords held that the loss was a war loss, on the ground that the "Devonshire" was engaged in a warlike operation.

The Bonvilston and Geelong (*Commonwealth Shipping Representative* v. *Peninsular & Oriental Branch Service* (1923), A. C. 191; 39 T. L. R., 133. *The Geelong* was carrying a general cargo from Port Said to Gibraltar for orders and proceeding as usual at night at full speed without lights. *The Bonvilston* was carrying ambulance wagons and other government stores from Mudros, the advance base for the Gallipoli campaign, back to Alexandria, which was also a war base. The House of Lords held that *The Bonvilston* was engaged in a warlike operation and, therefore, the loss was a war loss. Lord Sumner used this very contradictory argument, 39 T. L. R., at page 137 [1923], A. C., at page 208:

> "Had this case been the first of its class to be decided, instead of being the latest, I can understand that some difficulty might have been felt in saying that the operation was warlike, for in itself it was peaceable enough. It was unaggressive; it was unobtrusive, not to say furtive; and the *Bonvilston* would have behaved in exactly the same way, if she had been carrying a purely commercial cargo between exclusively mercantile ports. The difficulty is to distinguish this case, if not from previous decisions, for none quite cover the point, at least from *dicta* more or less closely involved in them."

The Warilda (1923), A. C., 292; 39 T. L. R., 333.

The Warilda was carrying wounded soldiers from Havre to Southampton, and, in view of the known

German method of sinking hospital ships, she was operating at full speed, without lights and without distinguishing marks. She came into collision with the steamship "Petingaudet" which was carrying an ordinary mercantile cargo of coke. The Courts found that the actual collision was due to an error in navigation by the commander of *The Warilda*. The House of Lords held that *The Warilda* was engaged in a warlike operation and that the loss was due to that operation, and it was immaterial whether it was being skillfully or negligently conducted. On the subject of negligence, Lord Sumner said, 39 T. L. R., at page 336:

> "I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions, when the question is how to attribute blame to persons, but is only evidentiary in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified."

There have been a large number of decisions of the inferior Courts in England dealing with the same problem—some of which are difficult to reconcile. They are substantially all referred to in the opinion of Lord Sumner in *The Warilda*, 39 T. L. R., at page 336 [1923], A. C., at page 302. It is believed, however, that the above summary is a fair statement of the English law as laid down by the Court of last resort.

With all possible respect to the learned Lords, it is submitted that the course of these decisions shows too narrow a course of reasoning. They have made distinctions which fall little short of grotesque. This is illustrated by the following results under the English decisions:

If a merchant ship in convoy comes into collision with another merchant ship, either in or outside the

convoy (no negligence being involved), the loss falls upon marine underwriters, but if the collision is with one of the warships escorting the convoy, the loss falls on the war risk underwriters, even though no hostile attack is involved and though it may be the purest accident that determines which ship is struck. This is the necessary result of saying that in a convoy the escorting warships are engaged in a warlike operation, but that the merchant ships are not engaged in a warlike operation. ("The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peace-like operation of conveying merchandise by sea. The sheep are not the shepherd, and are not engaged in the operation of shepherding," per Atkin, L. J., in the *Matiana* (1919), 2 K. B., 690, quoted several times with approval in the *Matiana* (1921), A. C., at pp. 118, 121.)

If two ships (whether privately operated or under requisition) traveling at night at full speed, without lights, in accordance with Admiralty instructions, come into collision, without either being at fault, then

(1) If both of them are carrying ordinary commercial cargoes, the loss falls upon the marine underwriters (*The Petersham* (1921), 1 A. C., 99); but

(2) If either of the ships is carrying ambulance wagons and government stores to a war base (even as far away from actual hostilities as Alexandria, Egypt) then the loss falls upon war risk underwriters (*The Bonvilston* (1923), A. C., 191).

(3) And this is so even though the character of the cargo does not in any way affect the navigation of the vessels (see Lord Sumner's remarks in *The Bonvilston* (1923), A. C., at page 208, quoted above).

If a merchant ship carrying a commercial cargo comes into collision with a warship, then

(1) If both ships are at fault, or if neither is at fault, or if the warship alone is at fault, the loss falls upon war risk underwriters (*The Ardgantock* (1921), 2 A. C., 141; *The Warilda* (1923), A. C., 292) even though the warship may not be actually performing any naval duty but is merely proceeding to some designated port where she intends to take up some naval operation, such as escorting a convoy (*The Richard de Larrinaga* (1921), 2 A. C., 141);

(2) But if the merchant ship alone is negligent, then the loss falls on the marine underwriters (*Charente Steamship Co.* v. *Director of Transports,* 38 T. L. R., 148, 149, 434, referred to with approval (1923), A. C., at page 304.

It is believed that the above distinctions disregard the real substance of the issues. It is undoubtedly the intent of all parties that marine underwriters during war shall continue to bear the same risks that they bore in times of peace, and that the new risks brought about by war, namely, those resulting from (in the language of the policy), "acts of kings, princes and people authorized by and in prosecution of hostilities between belligerent nations," are specially insured at a premium vastly in excess of the marine premium. It is submitted that this plain intent is wholly defeated by a refinement, such as making the character of the cargo of either of the vessels determine upon which set of underwriters the loss will fall, or treating a collision with escorting warships as falling upon a different set of underwriters from a collision with one of the escorted ships. The proper test is to look at the efficient, dominating, or proximate cause. Was the collision between the "Napoli"

and the "Lamington" the result of the ordinary causes of collision, such as faulty navigation, fog, neglect of sailing rules, etc., or was it, in its essence, the result of the act of the naval authorities in sending two great fleets of ships, in close formation, showing no lights, on courses which met, without warning either fleet of the impending approach of the other? Lord Wrenbury expressed the same thought in these words (1921), 1 A. C., at page 135:

> "If the operation relied upon as a warlike operation is one which creates no new risk, but only aggravates or increases an existing maritime risk by removing something which, but for the war, would have been a safeguard against the risk, then the risk is not a war risk. But if the peril be directly due to hostile action, it is a war risk."

Can it be doubted that the naval authorities by their handling of the convoys created a new risk, as part of the general plan for prosecuting hostilities, and that it was this new risk that was the proximate cause of the collision?

While not directly in point, the following cases in the Circuit Court of Appeals are suggestive in this connection:

> *The Canadia, Muller* v. *Globe and Rutgers*, 246 Fed., 759; (C. C. A. 2nd Ct.);
> *The Llama, United States* v. *Standard Oil Co.*, 291 Fed. 1; (1923 A. M. C. 863).

In each of these cases a merchant vessel had been stopped by a British patrol, a prize crew had been put on board, and the vessel had been directed to proceed to Kirkwall for examination by the British authorities. While proceeding toward Kirkwall, both ships stranded

and were lost. In the case of "The Canadia," it was found, as a fact, that the navigation of the ship was directed by the British Naval Prize Officer; while in "The Llama" this fact was disputed, and the lower courts differed on the point. All the judges in both cases, however, seem to have concurred in the view that if the navigation of the vessel was directed by the British Naval Prize Officer on board, the loss would be a war risk loss. A writ of certiorari has been granted by this Court, at the present term, in the case of "The Llama."

POINT II.

Merchant ships sailing in convoy are engaged in a warlike operation, under American law.

The Supreme Court of the United States has already considered the status of merchant ships under belligerent convoy and has reached a conclusion in accord with the views expressed by Mr. Justice Bailhache and Lord Shaw, and against those of the majority judges in the House of Lords.

In the case of *The Atalanta,* 3 Wheaton 409, this Court held that a neutral cargo, found on board an armed enemy's vessel, is not liable to condemnation as prize of war. Mr. Justice Johnson, however, in a very carefully considered opinion, drew a distinction between the case of neutral cargo shipped on an armed enemy's vessel, and the case of a merchant vessel which accepts the protection of a belligerent convoy. Mr. Justice Johnson said (p. 423):

> *"A convoy is an association for a hostile object;* in undertaking it, a nation spreads over the

> merchant vessel an immunity from search, which belongs only to a national ship; and *by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine,* and adds to the numerical, if not to the real, strength of the convoy. * * * To elucidate this idea, let us suppose the case of an individual, who voluntarily fills up the ranks of an enemy, or of one who only enters upon the discharge of those duties in war, which would otherwise take men from the ranks; and the reason will be obvious, why he should be treated as a prisoner of war, and involved in the fate of a conquered enemy." (The italics are ours.)

This language follows the dictum in the dissenting opinion of Mr. Justice Story in *The Nereide,* 9 Cranch 388-415.

Mr. Justice Story says:

> "On the whole, on this point, my judgment is, that the act of sailing under belligerent or neutral convoy is, of itself, a violation of neutrality, and the ship and cargo, if caught *in delicto,* are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offense, still, that the resistance of the convoy is, to all purposes, the resistance of the associated fleet."

The language above quoted from both *The Atalanta* and *The Nereide,* was dictum, but it has been adopted as the law of this country.

In *The Ship Galen* v. *The United States* (37 Court of Claims, 89), it appeared that an American merchant ship had sailed from England under British convoy. Nine days after leaving the convoy she was captured by a French privateer. In holding that the vessel was not

subject to condemnation under the Law of Nations, in view of the fact that she had left the convoy, the Court said:

> "The true reason why a vessel captured while sailing under convoy is liable to condemnation is that *she has for the time being allied herself with the enemy; she has become part of the hostile whole.* * * * She is, for the time, a vessel which must be known by the company she keeps.
>
> Figuratively speaking again, when she joins the convoy, and as long as she continues with it, she has hauled down her neutral flag and is sailing under the flag of the convoy. It is too late when she falls into the hands of her captor to run up her own flag. The right of capture (not of search) rests upon the fact that she is then a *part of a hostile force.* Mr. Justice Johnson, in *The 'Atalanta'* (3 Wheat., R., 409, 424), clearly illustrates the true ground of a vessel's liability when he likened her to a neutral citizen who enlists in the army of a belligerent and is taken prisoner of war, and who is thereby 'involved in the fate of a conquered enemy.'" (The italics are ours.)

To the same effect see *The Schooner Nancy* (27 Court of Claims, 99) and *The Black Sea Nymph* (36 Court of Claims, 369).

Mr. Woolsey, in his work on *International Law,* 4th Edition, Section 193, page 329, in discussing merchant ships which sail in convoy, says:

> "Upon the whole, the intention to screen the vesels behind the enemy's guns, is so obvious, that the act must be pronounced to be a decided departure from the line of neutrality, and one which may justly entail confiscation on the offending party."

1 Kent, Commentaries, 4th Edition, Section 155, page 154, Part I, Lecture 7:

> "The very act of sailing under the protection of a belligerent or neutral convoy, for the purpose of resisting search, is a violation of neutrality."

Moore, in Volume 7 of his *International Law Digest,* page 494, quotes the dictum of Mr. Justice Story in *The "Nereide"* (*supra*), as stating the law of this country at the present time, in regard to the status of merchant ships in convoy.

POINT III.

There is no commercial necessity requiring the American courts to follow the British decision.

The present is not a case in which the English courts have established a rule of law upon which underwriters have acted and which the American courts are now asked not to follow. The English rule was established in the cases of "The Petersham" and "The Matiana", which were not finally determined until 1921. The English test as to whether a loss falls upon marine or war risk underwriters is, therefore, *ex post facto,* having been created since the Armistice, and the American courts are just as free as the British courts were to determine the question for themselves. As the decisions of the House of Lords in those cases were quite at variance with the decision in "The St. Oswald", the only decision in the Court of Appeals prior to the Armistice, any underwriter who acted upon the law as laid down in "The St. Oswald" would find his calculations upset just as much in England as in the United States.

It is admitted that uniformity of decision on commercial matters between the courts of the United States and Great Britain is desirable. We believe, however, that this Court has never allowed this desirability to induce it to adopt in this country a rule of law which seemed to this Court to be erroneous simply because the rule had been adopted by the English courts.

This is particularly true in the present case because the law of the United States already differs from the law of England on two very material points.

1. Merchant ships in convoy are regarded in this country as participating in a war-like operation (see Point II above).

2. The rule as to what constitutes a war risk is substantially different in this country. On this point see *"The Kattenturm"* (*Becker Gray & Co.* v. *London Assurance Corporation*) (1918) A. C. 101. In that case "The Kattenturm", a German merchant ship, sailed from the Far East in July, 1914, and upon the outbreak of war found herself in the Mediterranean. Her master sailed her to Messina, which was then a neutral port, because he feared that if he attempted to pursue his voyage, he would be captured by the British before he could reach a German port. The House of Lords held that no loss could be recovered from war risk underwriters.

Lord Dunedin frankly admitted that the decision was at variance with American law, saying [1918] A. C., 101, at p. 107:

> "If there were no decisions on the point, and the expression 'men-of-war, enemies and restraint of princes,' as used in a policy of insurance, had

> to be considered for the first time, it might not be difficult to say that the adventure in this case was frustrated by the outbreak of war and, that being so, to hold that it fell within the words as above. This indeed is the result at which the jurists of the Continent and of America have arrived. Thus Phillips on Insurance (c. 13, sec. X, par. 1115), after stating the question 'Whether a loss consequent upon the imminency of a capture, arrest, restraint, or detention, is within the risk assumed by insurance against such perils,' cites Emerigon and other foreign jurists, and pronounces the correct rule to be as follows: 'Where, after the risk has begun, the voyage is inevitably defeated by blockade, or interdiction at the port of departure, or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended; and also that an assured on the cargo has a right to abandon.'
>
> The English authorities have not adopted this rule."

and the difference is also admitted by Lord Sumner (p. 116) with whose opinion Lord Atkinson and Lord Wrenbury concurred.

It must also be remembered that the policies involved in the present case were issued by an insurance company incorporated under the laws of the State of New York, to an assured incorporated under the same laws (p. 1) and covered a voyage from New York to Genoa (p. 2), and that the policy upon which this suit is brought (as well as the marine policy issued by the petitioner) were executed in New York (Exhibits A, AA and B following p. 6). If we are right in thinking that the English courts have reached an erroneous conclusion, it is submitted that the rights of American underwriters

under purely American contracts should not be wrongly determined merely in the interest of uniformity on the theory that uniformity of error is better than at least partial justice.

Respectfully submitted October, 1923.

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